

II. Double Patenting Rejections

Claims 1-48 and 50-59 are provisionally rejected under the judicially created doctrine of obviousness-type of double patenting as allegedly unpatentable over claims 50-100 of copending Application No. 10/470,131, over claims 1-17, 23-48, and 50-56 of copending Application No. 10/690,696, and over claims 1-17, 27-51, and 53-59 of copending Application No. 10/688,970. Office Action, page 2.

In addition, claim 1 is rejected under the judicially created doctrine of obviousness-type double patenting as allegedly unpatentable over claim 89 of U.S. Patent No. 6,602,303 B2. *Id.*, page 3.

Applicants respectfully traverse these rejections, but request that these rejections be held in abeyance until allowable subject matter is indicated. At that time, Applicants will consider whether or not to file a Terminal Disclaimer.

III. Rejection under § 102(b)

The Examiner rejects claims 1, 2, 4-16, 19, 20, 24-40, 43-51, and 53-56 under 35 U.S.C. § 102(b) as being anticipated by Laurent et al. (U.S. 2002/0046431 A1) ("*Laurent*"). Office Action, page 4. Specifically, the Examiner alleges that *Laurent* "teaches a hair dyeing composition comprising at least one oxidation dye and its sulfate as acid addition salt (see page 10, paragraph, 0266 and page 13, paragraph, 0316) and cationic poly(vinyl lactam) polymers . . . (see page 6, paragraphs 0155-0166 and page 7, paragraphs, 0167-0177)." *Id.* at pages 4-5. The Examiner further alleges that *Laurent* teaches other elements recited in the rejected dependent claims and the process and multi-compartment devices as recited in the rejected claims 50, 51, and 53-56. *Id.* at

pages 5-6. The Examiner concludes that *Laurent* anticipates the rejected claims. *Id.* at page 6. Applicants respectfully traverse this rejection.

As an initial matter, Applicants respectfully point out that *Laurent*, a published U.S. application, and U.S. Patent No. 6,602,303, asserted above under obviousness-type double patenting, are both based on U.S. Application No. 09/927,510, filed August 13, 2001, and both claim priority to French Patent Application No. 00/10593. In other words, *Laurent* is the published application corresponding to U.S. Patent No. 6,602,303.

As the Examiner himself has already stated, claim 89 of the '303 patent "is not identical to the instant claim because [it], requires a combination comprising at least one compound chosen from oxyalkylenated fatty alcohols and glycerolated fatty alcohol and at least one hydrogenated [sic] solvent having a molecular weight of less than 250 to be presented in the composition, while the instant claim 1 does not require the combination of fatty alcohols and the solvent to be presented in the dyeing composition." Office Action at 4. Accordingly, as admitted by the Examiner, the claims of the '303 patent do not anticipate the instant claims.

Further, with respect to anticipation, "[a] claim is anticipated only if each and every element as set forth in the claim is found, either expressly or inherently described, in a single prior art reference." M.P.E.P. § 2131 (quoting *Verdegaal Bros. v. Union Oil Co. of California*, 814 F.2d 628, 631, 2 USPQ2d 1051, 1053 (Fed. Cir. 1987)) (emphasis added). Further, a rejection under § 102 is proper only when the claimed subject matter is identically described or disclosed in the prior art. *In re Arkley*, 455 F.2d 586, 587, 172 U.S.P.Q. 524, 526 (CCPA 1972) (emphasis added). The identical invention must be described in as complete detail as is contained in, and must be arranged as required

by, the claim. M.P.E.P. § 2131. In addition, the reference must "clearly and unequivocally disclose the claimed compound or direct those skilled in the art to the compound without any need for picking, choosing, and combining various disclosures." *Arkley*, 455 F.2d, at 587, 172 USPQ at 526 (emphasis added).

Here, *Laurent* teaches a composition for oxidation dyeing of keratinous fibers, comprising (a) at least one oxidation dye, (b) at least one cationic amphiphilic polymer comprising at least one fatty chain, and (c) a combination comprising (1) at least one compound chosen from oxyalkylenated fatty alcohols and glycerolated fatty alcohols, and (2) at least one hydroxylated solvent with certain weight ratio. Page 1, paragraphs [0001]-[0007].

For the at least one oxidation dye, *Laurent* teaches that it is "chosen from those conventionally known as oxidation dyes" such as "ortho-phenylenediamines, para-phenylenediamines, double bases, ortho-aminophenols, para-aminophenols, heterocyclic bases and their acid addition salts." Page 10, paragraph [0264]. Further, *Laurent* teaches that "the acid addition salts of the oxidation bases and couplers can be chosen from hydrochlorides, hydrobromides, sulfates, tartrates, lactates and acetates." Page 13, paragraph [0316].

For the at least one cationic amphiphilic polymer comprising at least one fatty chain, *Laurent* teaches that it "may be chosen for example from quaternized cellulose derivatives, cationic polyurethanes, cationic polyvinyl lactams and acrylic terpolymers." Page 2, paragraph [0056].

Therefore, to arrive at the presently claimed invention, one would have to pick and choose the sulphate form of the at least one oxidation base from various types of

acid addition salts of the oxidation bases disclosed in *Laurent* and to pick and choose cationic polyvinyl lactams as the at least one cationic amphiphilic polymer comprising at least one fatty chain from various other candidates disclosed in *Laurent*. Such picking and choosing cannot be the basis for a proper section 102(b) rejection. Accordingly, this rejection is improper.

In view of the above, Applicants respectfully request that this rejection be withdrawn.

IV. Rejection under 35 U.S.C. § 103(a)

The Examiner further rejects claims 3, 17, 18, 21-23, 41, 42, 52, and 57-59 under 35 U.S.C. § 103(a) as allegedly unpatentable over *Laurent*. Office Action, page 7.

Specifically, the Examiner relies on the disclosure discussed above, and admits that *Laurent* “does not teach or disclose the percentage amounts of the oxidation dyes in the form of a sulfate, the amounts of cationic amphiphilic polymers of poly(vinyl lactams) and the amount of surfactants . . . [and] a three multi-compartment device as claimed.” *Id.*

To remedy these deficiencies, the Examiner alleges that because *Laurent* “teaches a dyeing composition comprising at least one cationic amphiphilic polymer[] in the amount of 0.01 to 3% by wt. (see page 26, claim 45) and effective amounts of at least one agent conventionally used in oxidation dyeing . . . including surfactants (see page 21, paragraph, 0466),” it would have been obvious for one of ordinary skill in the art to formulate a composition as claimed in the present application “by optimizing the amounts of the oxidation dyes, cationic amphiphilic polymers and surfactants in the dyeing composition with the reasonable expectation of success.” *Id.* The Examiner

further alleges that because *Laurent* “teaches a device or kit for dyeing hair comprising at least two compartments (see page 27, claim 66),” it would have been obvious for one of ordinary skill in the art to use the three multi-compartment device as claimed. *Id.* at pages 7-8. Applicants respectfully traverse this rejection for at least the following reasons.

To establish a *prima facie* case of obviousness, three basic criteria must be met, including that there is some suggestion or motivation, either in the cited reference itself or in the knowledge generally available to one of ordinary skill in the art, to modify the reference teachings. M.P.E.P. § 2143. The teaching or suggestion to modify must be found in the prior art, not in Applicants’ disclosure. *In re Vaeck*, 947 F.2d 488, 493, 20 USPQ2d 1438, 1442 (Fed. Cir. 1991). In addition, the Examiner must consider the prior-art reference in its entirety, *i.e.*, as a whole, including portions that would lead away from the claimed invention. M.P.E.P. § 2141.02 (citing *W.L. Gore & Associates, Inc. v. Garlock, Inc.*, 721 F.2d 1540, 220 USPQ 303 (Fed. Cir. 1983)) (emphasis in original).

First, the Examiner has failed to point to any evidence of a suggestion or motivation to choose the sulphate form of the at least one oxidation base from various types of acid addition salts of the oxidation bases disclosed in *Laurent*. As discussed above, *Laurent* discloses that its oxidation dye is “chosen from those conventionally known as oxidation dyes” such as “ortho-phenylenediamines, para-phenylenediamines, double bases, ortho-aminophenols, para-aminophenols, heterocyclic bases and their acid addition salts.” Page 10, paragraph [0264]. Further, *Laurent* discloses that “the acid addition salts of the oxidation bases and couplers can be chosen from

hydrochlorides, hydrobromides, sulfates, tartrates, lactates and acetates.” Page 13, paragraph [0316]. All types of acid addition salts are equally disclosed without any preference given to the sulphates. Therefore, in view of *Laurent*, one of ordinary skill in the art would not be motivated to choose the sulphate form of the at least one oxidation base from other types of acid addition salts disclosed herein. Further, the Examiner’s reliance on the disclosure of certain concentration ranges and multi-compartment devices in *Laurent* does not remedy this deficiency and is thus misplaced.

Second, the Examiner has failed to point to any evidence of a suggestion or motivation to choose cationic polyvinylactams as the at least one cationic amphiphilic polymer from various other candidates disclosed in *Laurent*. As discussed above, *Laurent* discloses that its cationic amphiphilic polymer comprising at least one fatty chain “may be chosen for example from quaternized cellulose derivatives, cationic polyurethanes, cationic polyvinylactams and acrylic terpolymers.” Page 2, paragraph [0056]. Examples of *Laurent*’s cationic amphiphilic polymers are equally disclosed without any preference given to cationic polyvinylactams. Indeed, in the Examples of *Laurent*, “[c]ationic amphiphilic polymer: Quatrisoft LM 200” is used, which is not a cationic polyvinylactam but a quaternized cellulose derivative. Therefore, one of ordinary skill in the art would likely choose quaternized cellulose derivatives among various cationic amphiphilic polymers in view of the Examples disclosed in *Laurent*, teaching away from the presently claimed invention.

Further, again, the Examiner’s reliance on the disclosure of certain concentration ranges and multi-compartment devices in *Laurent* does not remedy this deficiency and is thus misplaced.

Third, even *Laurent* discloses that its device comprises at least two compartments, no suggestion or motivation exists to include the at least one cationic poly(vinyl lactam) in a third compartment as claimed in, for example, claim 57 of the present invention.

Therefore, as the Examiner has failed to establish a *prima facie* case of obviousness, Applicants respectfully request this rejection be withdrawn.

V. Conclusion

In view of the foregoing remarks, Applicants respectfully request reconsideration of this application, and the timely allowance of the pending claims.

If the Examiner believes a telephone conference would be useful in resolving any outstanding issues, the Examiner is invited to call the undersigned Applicants' representative at (202) 408-4218.

Please grant any extensions of time required to enter this response and charge any additional required fees to our Deposit Account No. 06-0916.

Respectfully submitted,

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